FILE COPY

NOV 25 1
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 934 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

BRYANT, R. L., Administrator of M. L. Bryant, Deceased, Respondent.

MOTION OF RESPONDENT TO DISMISS,

and

BRIEF IN SUPPORT OF THE MOTION.

CHARLES CURRY,
For Respondent.

R. B. STEPHENSON,
CURRY CARTER,
Of Counsel.

(34,243)

INDEX

Subject Index

	Page
Notice of submission of motion to dismiss	1
Motion to dismiss	2
Brief of Charles Curry, Attorney for Respondent in support of motion to dismiss	3
The Federal Employers Liability Act does not apply, as Bryant was not an employee of defendant when he was shot	4
This action was brought under the Virginia Statute and the defendant pled that it comes under the Federal Statute	7
Can it be pretended by the defendant with any sincerity that the Federal Statute controls, and that this Court has jurisdiction?	13
The burden was on the defendant to prove that Bryant was in its employment in interstate commerce at the time of the shooting	15
Conclusion	21
(Petitioner is referred to as the defendant, the respondent as the plaintiff, and the deceased as Bryant)	3

Table of Cases Cited

Ætna Life Ins. Co. v. Dunkan 266 U. S. 389-394	5
Egan v. Hart 165 U. S. 180, 41 L. Ed. 680	5
Missouri K. & T. R. Co. v. West 232 U. S. 682, 58 L. Ed. 795	5
Minneapolis Etc. R. Co. v. Minnesota Etc. Com. 133 U. S. 53	12
N. C. R. Co. v. Zachary 232 U. S. 248, 58 L. Ed. 591	16
Northwestern Union Packett Co. v. McCues Adrmx. 94 U. S. 508	20
Pennsylvania Co. v. Marion Donat 239 U. S. 49, 60 L. Ed. 139	20
Saunders v. So. R. Co. 117 Va. 399	13
Seaboard Etc. R. Co. v. Moore 228 U. S. 434, 57 L. Ed. 907	16

Statutes Cited

Federal Employers' Liability Act U. S. C. A. 45 p. 92, Sec. 51	4-8
Va. Code 1919 Sec. 5786	4-7
Va. Code 1919 Sec. 6117	13

Authorities Cited

Burk's Pl. & Pr. 2nd Ed. 469	14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

934

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner,

v.

BRYANT, R. L., Administrator of M. L. Bryant, Deceased, Respondent.

NOTICE, MOTION AND BRIEF OF ATTORNEY FOR RESPONDENT.

I.

Notice of Submission of Motion to Dismiss.

Mr. J. Martin Perry, Attorney for the Chesapeake and Ohio Railway Company, Petitioner:—

Please take notice that on Monday, the 18th day of November, 1929, at the opening of the Court, or

as soon thereafter as I can be heard, the motion, of which the attached is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Annexed hereto is a copy of my brief which will be submitted with said motion and in support thereof; and I will also rely on my brief opposing writ of certiorari in support of said motion.

Given under my hand this the 2nd day of November, 1929.

CHARLES CURRY,

Attorney for Bryant, R. L., Administrator of M. L. Bryant, Deceased, Respondent.

Service of the above notice is accepted, this November 2, 1929.

J. M. PERRY,

Attorney for the Chesapeake and Ohio Railway Company, Petitioner.

II.

Motion to Dismiss.

This day came the respondent, in the above entitled case, by his Attorney, Charles Curry, and moved the Court to dismiss the writ of certiorari to the Supreme Court of Appeals of Virginia, here-

tofore granted in this case, for want of jurisdiction; because the said writ was improvidently granted, as the jurisdiction of this Court depends on a sole question of fact that was passed on and settled by the State Courts against petitioner; and the question of fact referred to was, whether, or not, the deceased was in the employment of the petitioner, in interstate commerce, at the time of the fatal shooting complained of, and the evidence was that he had been so employed, but had been discharged from the employment of petitioner, two days before the shooting, and was not in its employment at the time of the shooting.

CHARLES CURRY,

Attorney for Bryant, R. L., Administrator of M. L. Bryant, Deceased, Respondent.

III.

Brief of Charles Curry, Attorney for Respondent in Support of Said Motion.

In this brief the petitioner will be referred to as the defendant, the respondent as the plaintiff, and the deceased as Bryant.

IV.

The Federal Employers Liability Act Does Not Apply, as Bryant Was Not an Employee of Defendant When He Was Shot.

It is not pretended, nor claimed by the defendant that any Federal question is involved in this case that gives this Court jurisdiction, unless it comes under the purview of the Federal Employers Liability Act. U. S. C. A. 45 p. 92 Sec. 51.

The defendant was a common carrier by rail engaged in commerce between the States, and for this case to come under the Federal Statute, Bryant must, at the time he was shot, have been employed by the defendant in interstate commerce. He had been for several years so employed (R. 143), as a section laborer, but had been discharged from defendant's service before the shooting occurred. The Federal Statute did not control unless Bryant was actually in the defendant's service in interstate commerce at the time of the tragedy. It was therefore, necessarily a question of fact as to whether or not he had been discharged from defendant's service. The State Courts held that, on the evidence, Bryant had been discharged and was not in the employment of the defendant at the time of the fatal shooting, and that, therefore, the Federal Statute has no application, and that the case comes under the Virginia death loss statute. Va. Code 1919, Sec. 5786.

It was a simple question of fact, as to which statute applied, and this having been decided by the

State Courts in favor of the plaintiff is final and binding upon this Court.

This Court said in the case of Egan v. Hart 165 U. S. 180, 41 L. Ed. 680:

> "On error to a State Court, this Court cannot re-examine the evidence, and, when facts are found below, is concluded by such finding."
>
> See the cases referred to by us in our brief opposing writ of certiorari, 2 and 3.

The general rule of this Court that the judgment of a State Court on a question of fact can not ordinarily be inquired into and considered has two well settled exceptions: (1) "Where a Federal Right has been denied as the result of a finding shown by the record to be without evidence to support it; and (2), where a conclusion of law as to a Federal right and finding of fact are so intermingled as to make it necessary in order to pass on the Federal question, to analyze the facts." Aetna Life Ins. Co. v. Dunkan 266 U. S. 389-394, quoted from and considered in our brief opposing writ of certiorari, 3 and 4.

These exceptions have, however, no application to this case, nor have they been relied on by petitioner.

In the case of Missouri K. & T. R. Co. v. West 232 U. S. 682, 58 L. Ed. 795, this Court held that:

> "Whether the injured person was not an employee of the railway company causing the injury, is a **question of fact,** and if there is a finding supported by the record that he was not, this Court cannot review the judgment of the State Court. Syllabus.

Justice McKenna in the West case supra said:

> "The State Court having decided, with substantial grounds for the decision, that the pleadings and evidence show an action under the employment by the express company, no denial of Federal right is involved, and therefore, motion to dismiss must be granted. And as the action was brought under the State law, and not under the Federal law, it becomes unnecessary to notice errors assigned by the railway company, including that based on the instruction of the trial court that a verdict could be rendered by three-fourths of the jury."

The evidence in this case supporting the finding of the State Court is as shown in the opinion of Judge Burks, R.164-65-66, strong and decisive; and is it not obvious that this case comes under the Virginia, and not the Federal Statute, and that this Court has no jurisdicion, and that on our motion

ought to be dismissed under authority of the West case supra?

V.

This action was brought under the Virginia Statute and the defendant pled that it comes under the Federal Statute.

The plaintiff assumed when he brought his suit that Bryant was not an employee of the defendant when the mischief complained of happened, and proceeded under the Virginia Statute, which in so far as it relates to this case, provides:

> "Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation * * *, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action * * *, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation ***, would have been liable, if death had not ensued, shall be liable to an action for damages * * *, and although the death shall have been caused under such circumstances as amount in law to a felony." Virginia Code 1919. See 5786.

Bryant was shot by defendant's servant and section foreman, Don Dodson, on Monday morning,

August 31, 1925; and this action was begun on the 19th day of May, 1926, in the Circuit Court of Alleghany County, Virginia. At the July term of that court, the defendant appeared and pled "not guilty," and the case was continued; and at the next term the defendant, on October 15, 1926, filed a special plea avering, in effect, that the Federal Employers Liability Act, U. S. C. A., Title Railroads, 45 p. 92 Sec. 51, controls. R. 21-22, R. 22.

The Federal Statute, in so far as of interest here, provides:

> "Every common carrier by railroad while engaged in commerce between any of the several states * * *, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, or his or her personal representatives, * * *, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *."

The plaintiff replied to defendant's special plea and denied that Bryant was in the employment of the defendant in interstate commerce, at the time of the happening of the mischief complained of, R. 24.

The plaintiff moved to strike out defendant's special plea, but his motion was over-ruled; and the

defendant moved the court to reject the plaintiff's replication, when it was offered, but the motion was over-ruled, R. 23-24.

On April 27, 1927, the defendant filed three grounds of defense. R. 24-25. The third ground was that it was engaged in interstate commerce and that Bryant was in its employment in such commerce, at the time of the shootting complained of, R. 25, and the trial was forthwith begun. Evidence was introduced both on behalf of the plaintiff and defendant, and when both had rested, the defendant demurred to the evidence "with its statement of grounds thereof" in writing, and the plaintiff joined therein ,R. 26, and the demurrer and grounds of demurrer are set out in the record, R. 160-161. The jury assessed the damages at Eight Thousand Dollars ($8,000.00) and, the court finding that the law, on the evidence, was with the plaintiff, over-ruled the demurrer and gave judgment for the plaintiff for Eight Thousand Dollars ($8,000.00), R. 26.

It will thus be seen that the issue as to whether or not Bryant was employed by defendant in interstate commerce, at the time of the tragedy was clearly made by the pleadings, and was without question, an issue of fact, and on the evidence was decided for the plaintiff.

The judgment of the trial court was that the Federal Statute does not apply. This judgment was affirmed by the Supreme Court of Appeals of Virginia by a full court, January 19, 1928, R. 176-

177; and see the opinion of the Court delivered by Judge Burks, R. 163 et seq. This learned Justice, after reviewing the evidence, as to whether Bryant was in the employment of the defendant when he was shot, said in his opinion, R. 166:

> "Bryant was not an employee of the company (the defendant) at the time of the shooting. The case, therefore, is controlled by the State Statute."

This Court said in the case of Clipper Mining Co. v. Eli Mining & Land Co. 194 U. S. 220-222, 48 L. Ed. 944-948:

> "It is the settled rule that this Court, in an action of law, at least, has no jurisdiction to review the conclusions of the highest Court of the State upon questions of fact." Citing numerous cases.

The Supreme Court of Appeals of Virginia, in effect, held that the question whether or not Bryant was an employee of the defendant, at the time of the shooting, was a mere minor question, because following the above quotation from the opinion by Judge Burks, it is said, R. 166:

> "The chief question involved is, was Dodson acting in the course of his employment, or within the scope of his au-

> thority when he shot Bryant." (And this was a question of fact.)

The case was afterwards reheard on a petition for rehearing; the petition was first refused, R. 186, and was afterwards granted, R. 187, and on the rehearing was decided by a divided Court, R. 188.

The question upon which the Court divided, however, could not have been whether Bryant was in the employment of the defendant, at the time of the shooting, for there is no evidence that shows that he was so employed when the shooting occurred. It was in fact admitted by defendant that Bryant had been discharged from its service before the shooting. The only difference between the plaintiff and the defendant was as to the time of the discharge. Judge Burks said in the opinion of the State Supreme Court, R. 165-166:

> "Bryant was employed by the day, and either party had the right to terminate the service at will, without notice. Dodson, it is clear from the testimony, had the right to discharge him, and, independent of any other evidence in the case, Dodson testified that he discharged him on the previous Saturday. * * * Counsel agree, except as to the time of the discharge, and this is concluded, on a demurrer to the evidence, by the testimony of Dodson."

The shooting occurred on Monday morning, August 31, 1925, and Dodson, who was the defendant's section foreman, R. 84, said, R. 84-5, that he discharged Bryant on Saturday, August 29, 1925. Dodson, who himself had authority to discharge defendant's servants, working under him, R. 85, said that he discharged Bryant with the approval of Mr. L. E. Crance, R. 86. Bryant was the plaintiff's witness; and Mr. L. E. Crance was the defendant's witness and supervisor of tracks, and he said in chief, R. 141: **"I said (to Dodson) to tell him (Bryant) to leave and draw his money."** And the witness was then asked, R. 141: **"Q That was on Saturday afternoon?"** And the witness answered: **"Yes, sir."** Then followed the cross examination of Mr. Crance by plaintiff's Attorney, and the first question on cross examination asked him was: **"You in fact discharged him yourself or directed his discharge?"** And he answered: **"Yes, sir, I directed it."**

The fact that this case was finally decided by a divided Court in no way affects the general rule of this court, that the finding on facts by a State Court is final and conclusive. Minneapolis and St. L. R. Co. v. Minnesota, ex rel. Railroad and Warehouse Commission, 193 U. S. 53, which is quoted from in our brief opposing writ of certiorari, 4 and 5.

VI.

Can It Be Pretended by the Defendant With Any Sincerity That the Federal Statute Controls and That This Court Has Jurisdiction?

Defendant admitted in its demurrer to the evidence that Bryant was not in its employment when the shooting occurred. It is very true that this admission was made in defendant's grounds of demurrer to the evidence, but grounds of demurrer to the evidence are part of the demurrer itself. A demurrer to the evidence without the grounds stated in writing, is a vain thing under the Virginia Statute, Virginia Code, 1919, Sec. 6117. That Statute provides:

> "The party tendering a demurrer to the evidence shall state in writing specifically the grounds of demurrer relied on, * * * nor shall any ground of demurrer not thus specifically stated be considered * * *."

Our Virginia Court, in passing on and construing this Statute, said in Saunders v. So. R. Co. 117 Va., p. 399:

> "These statutory provisions are mandatory and preclude the idea of jurisdiction to consider a demurrer to the evidence, unless the grounds of such demurrer are specifically stated in writing."

And it must be observed that a demurrer to the evidence is a pleading, both at common law and in Virginia, Burks Pl. & Pr. (2d Ed.) 469. This admission of the defendant that Bryant was not in its service at the time of the shooting is a solemn admission, and we believe is binding and conclusive against the defendant. But if the grounds of demurrer to the evidence are not part of the demurrer, does that make any difference as to the force and effect of the admission?

The defendant said in its fourth ground of demurrer, R. 160:

> "That the plaintiff's intestate was discharged from defendant's employment on Saturday prior to the Monday of the shooting complained of, and not on said Monday, and said Dodson shot the plaintiff's intestate in the course and as the result of a private quarrel and misunderstanding, and not as a part of, and in the course of said Dodson's employment."

And in its seventh ground of demurrer, R. 161, said:

> "That the shooting of said intestate by said Dodson was entirely separated in point of time and occasion from said intestate's discharge from the defendant's employment, and was not done in the course of discharging intestate or in the course of said Dodson's employment or within the scope of his duties."

The admissions thus made by the defendant are founded on the evidence in the record. See the review of the evidence on the question of Bryant's discharge in the opinion of Judge Burks, R. 164-5.

VII.

The Burden Was on the Defendant to Prove That Bryant Was in Its Employment at the Time of the Shooting.

The defendant, in order to bring this case under the Federal Statute, was bound to show by a preponderance of evidence that Bryant was in its employment at the time of the shooting. This is clear from the very language of the Federal Statute. That Act has no application to an employee who is injured while not engaged in interstate commerce; nor does it apply to one who is not in the employment of an interstate railway at the time of his in-

jury. Where it is in doubt, as to whether an injured plaintiff, in an action against an interstate railway company, was in the employment of the defendant in interstate commerce, at the time of his injury, is a question of fact that should be submitted to a jury.

This Court said in the case of N. C. R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591:

> "Where, upon the evidence, any essential matter bearing on the question of whether an employee of a railroad company was, at the time of the injury, engaged in interstate commerce is in doubt, it should be submitted to the jury under proper instructions." See also Seaboard etc. R. Co. v. Moore 228 U. S. 434, 57 L. Ed. 907.

The defendant offered no evidence whatever to sustain its special plea, or, of its defense that Bryant was in its employment in interstate commerce at the time he was shot. The only witness in fact of defendant that was interrogated about Bryant's employment, at the time of the shooting, was Mr. L. E. Crance, Supervisor of tracks, who said, R. 141, that he had directed defendant's foreman, Dodson, to discharge Bryant on the Saturday before the shooting—two days before the tragedy happened.

The whole reliance of learned counsel for petitioner to bring this case under the Federal Statute is that, immediately, after Bryant had been discharged from the defendant's service, that he was shot by defendant's foreman, and that Bryant not having been given a reasonable time to leave the defendant's premises, that the Federal Statute applies. It is said in Mr. Perry's brief for petitioner, p. 18: "That the intestate was wounded by petitioner's foreman immediately after being discharged."

The theory of learned counsel on the other side is that Bryant's employment extended after he had been discharged until he had been given a reasonable time to leave the work and employment. No authority, however, has been referred to to show that the employment of a servant is extended for the benefit of the master after the servant has been discharged. Authorities are referred to by petitioner's attorney showing that the Federal Statute extends to servants going to and leaving their work. This, however, is implied from the contract of service. Here, however, the relation of master and servant had been ended and Bryant had become a mere licensee to leave the employment, and if he refusd to leave he became a trespasser.

We, however, challenge the learned attorney for petitioner to point out a scintilla of evidence in this case showing that the discharge and the shooting occurred close together. Defendant's foreman, Dodson, who did the shooting, said, R. 84-5, that Bryant **"was discharged on Saturday"**; and that

the shooting occurred **"on the following Monday morning."** And Dodson said that he discharged Bryant with the approval of Mr. Crance, Supervisor of tracks. Dodson was asked, R. 86: "Do I understand you to say that you discharged him (Bryant) then with the full approval of Mr. Crance?" and he answered, **"Yes, sir"**; and Mr. Crance said in his examination in chief and as a witness for the defendant, R. 141, that he directed Dodson to discharge Bryant on Saturday, two days before the shooting. That Bryant was discharged on Saturday is borne out by the circumstance that shortly after the section force had stopped work on Saturday, August 29, 1925, the whole section force, **except Bryant,** was called out to do emergency work. There had been a wreck at Moss Run, near where Bryant lived, and the section force was called out to clear away the wreck, and the force worked on that wreck until two o'clock Saturday night. See the testimony of G. T. Wright, R. 38-39, showing that Bryant was not included among the section hands called to do the emergency work, R. 39, and see also the testimony of Samuel J. Wright, R. 44-45, and the testimony of Frank Wright, R. 56.

It is true that on Monday, the 31st day of August, 1925, two days after he had been discharged, Bryant went back on the section to work. When he got to the tool house, the section hands were there and about ready to start off on their hand-car to their point of work on the defendant's railroad. Long, the regular foreman, had not re-

turned, and Dodson was in charge. As soon as Bryant had come up Dodson reminded Bryant that he had been discharged the Saturday before and could not work, R. 93. Bryant started to go into the tool house to get his tools and Dodson said to him, **"I don't need you any longer. * * * You get away from here."** Testimony of G. T. Wright, R. 46. Frank Wright said, R. 57: "When he (Bryant) stepped up into the tool house I heard Dodson say to Bryant, **'I ain't got anything more for you to do'**; and said, R. 58: "When Dodson told him that, Bryant, he just walked on to the tool house and got his pick and walked on out to the car and put it on the car." Taylor C. Thompson, R. 67, said "they were getting ready to get on the car and he, Dodson, said: **'I told you (Bryant) I wouldn't work you any longer. * * * Bryant, I told you to get off the job. You get away from here."** W. M. McDowell said "he (Bryan) picked up his dinner bucket and put it on the lever car and Dodson said to him, **"I told you that I wasn't going to work you any more, * * * just get on up the road, * * * well I done told you to just get up on the road, I ain't going to work you."** When the tragedy happened Dodson was standing at one end of the lever car and Bryant at the other end of the car, R. 47, and Dodson said to Bryant, **"fellow, I have just fooled with you long enough; you get away from here."** G. T. Wright's testimony, R. 46. Bryant was standing with his hands down and his gloves on without any weapon, but refused to leave in the

"face" of the gun that Dodson drew and pointed at him and Dodson began to shoot.

The uncontradicted evidence shows that Bryant was discharged on Saturday, two days before the shooting; that he was treated as discharged from the service on the following night and Sunday, when every member of the section force was called out, except Bryant, to do emergency work as referred to supra; and as soon as Bryant appeared on the following Monday morning to go to work he was told by Dodson that he had been discharged on Saturday, and that he must get away. .The State Courts found no difficulty in concluding that Bryant had been discharged on Saturday. The Virginia Courts could have found no other way, for there is no evidence in the record to warrant any other finding.

We here refer the Court to the case of Northwestern Union Packet Co. v. McCue's Admrx. 84 U. S. 508, which is fully quoted from and considered in our brief opposing writ of certiorari 8-9-10-11.

In the case of Pennsylvania Co. v. Marion Donat 239 U. S. 49, 60 L. Ed. 139, the trial court refused to charge the jury that Donat was not engaged in interstate commerce when he was injured and therefore could not recover, and submitted this question to the jury. This action of the trial court was approved by the Circuit Court of Appeals and this Court said that such approval "was clearly right." See our brief opposing writ of certorari 6

and 7, where the Donat case, supra, is considered and freely quoted from.

Conclusion.

We respectfully submit, that the contention by the defendant that the Federal Employers Liability Act applies to this case is without foundation and, frivolous, and that the motion of respondent ought to be sustained.

Respectfully submitted,

CHARLES CURRY,
Attorney for R. L. Bryant, Administrator of the Estate of M. L. Bryant, Deceased.

R. B. STEPHENSON and
CURRY CARTER, of Attorneys.